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No. 93-1350

In the Supreme Court of the United States

OCTOBER TERM, 1993

RAYMOND J. PATRIARCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, for purposes of sentencing for a RICO offense, "relevant conduct" may include uncharged racketeering acts committed by the defendant, or racketeering acts, charged or uncharged, committed by other members of the RICO enterprise.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A91) is reported at 4 F.3d 70. The opinion of the district court is reported at 807 F. Supp. 165.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1993. A petition for rehearing was denied on November 22, 1993. Pet. App. A92. The petition for a writ of certiorari was filed on February 22, 1994 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the District of Massachusetts, petitioner was convicted on one count of conspiring to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d); one count of committing a substantive RICO offense, in violation of 18 U.S.C. 1962(c); four counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952; and one count of conspiring to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to 97 months' imprisonment, to be followed by three years' supervised release, and he was fined $50,000. He was also ordered to pay $122,344 toward the cost of his incarceration, and $3,954 toward the cost of his supervision. The court of appeals vacated his sentence and remanded for resentencing. Pet. App. A1-A91.

1. The RICO charges in the indictment identified petitioner as the boss and ultimate supervisor of the Patriarca Family of La Cosa Nostra, a nationwide criminal organization. The indictment alleged that the Patriarca Family, named as the RICO enterprise, acted in conformity with the rules of La Cosa Nostra, including the requirement that members commit murder and other criminal acts at the direction of their superiors. The indictment stated that the Patriarca Family engaged in extortion, narcotics trafficking, loansharking, gambling, and murder. Pet. App. A6-A7.

The RICO counts alleged the commission of a total of 68 predicate acts, most of them by defendants other than petitioner. Petitioner was charged with personally committing five predicate acts consisting of violations of the Travel Act, four of which were also charged against petitioner as substantive counts in the indictment. Pet. App. A7.

2. Petitioner pleaded guilty without having entered into any plea agreement with the government. At sentencing, the government asked the district court, pursuant to Guidelines § 1B1.3, to consider seven instances of "relevant conduct," along with the charged conduct, in determining petitioner's base offense level for his RICO offenses. Those instances were: (1) petitioner's involvement in the drug trafficking of his associate Salvatore Michael Caruana; (2) petitioner's efforts to harbor Caruana as a fugitive; (3) the murder of Vincent James Limoli, which was committed by one of petitioner's co-defendants; (4) the murder of Theodore Berns, which was committed by Caruana purportedly because Berns was involved with Caruana's wife; (5) the narcotics activity charged against co-defendant Robert Carrozza; (6) petitioner's alleged authorization of an attempt to murder Vincent Ferrara; and (7) the harboring of La Cosa Nostra member Alphonse Persico while Persico was a fugitive from justice. Pet. App. A8-A9.

Of the seven acts relied on by the government, only the Limoli murder and Carrozza's drug trafficking were mentioned in the indictment; they were charged as predicate acts against petitioner's co-defendants but not against petitioner. The government acknowledged that petitioner had direct personal involvement

only in the Caruana drug trafficking and the harboring of Caruana as a fugitive. The government argued, however, that all seven activities qualified as relevant conduct for purposes of sentencing petitioner under the Sentencing Guidelines, because they were reasonably foreseeable by him, and were committed during and in furtherance of the RICO conspiracy after he joined it as boss in July 1984. Pet. App. A6, A9-A10.

The government asserted that holding petitioner responsible for the Limoli or the Berns murder would increase his base offense level to 43, but that this level should then be reduced to 40 because petitioner's role was minimal or minor under Guidelines § 3B1.2. With petitioner's criminal history category of I, an offense level of 40 called for a prison term of 292 to 365 months. Pet. App. A10-A11.

3. After numerous evidentiary hearings, the district court sentenced petitioner to 97 months' imprisonment, including an upward departure based on petitioner's acts of aiding and abetting Caruana's drug offenses. In so doing, the court held that relevant conduct in a RICO case is limited to the specific predicate acts charged against the defendant and conduct relating to the charged predicates. Accordingly, the court declined to hold petitioner accountable either for the racketeering acts committed by his co-conspirators in furtherance of the RICO conspiracy, or for uncharged predicate acts in which petitioner directly participated. Pet. App. A11-A15.

4. On appeal, the government challenged the district court's holding that relevant conduct for purposes of petitioner's sentence on the RICO counts was limited to the predicate Travel Act offenses

charged against him and conduct relating to those offenses. The court of appeals agreed with the government, concluding that relevant conduct in a RICO case includes the underlying predicate acts, whether charged or uncharged, committed either by the defendant himself or, if the defendant could reasonably foresee the acts, by other members of the RICO enterprise. Pet. App. A16.

The court of appeals reasoned that the base offense level for a RICO offense is to be determined on the basis of "relevant conduct" as that term is described in Guidelines § 1B1.3(a)(1). Pet. App. A19. The court observed that Section 1B1.3(a)(1)(B) states that "in the case of jointly undertaken criminal activity," such as petitioner's RICO enterprise, relevant conduct includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." Pet. App. A20. The court therefore concluded that petitioner "is potentially liable for the foreseeable criminal acts of others in furtherance of th[e] enterprise even though he did not personally participate in them." *Id.* at A20-A21. The court also held that relevant conduct may include predicate acts committed in furtherance of the enterprise even if they are not charged in the indictment. In so holding, the court relied on the background commentary to Section 1B1.3, which states that conduct that is not formally charged "may enter into the determination of the applicable guideline sentencing range." Pet. App. A27.

The court of appeals declined to read Guidelines § 2E1.1, which sets the offense level for a RICO violation at the greater of 19 or the offense level applicable to "the underlying racketeering activity,"

as limiting the relevant conduct for a RICO offense. Pet. App. A26-A30. The court explained that the term "underlying racketeering activity" does not refer only to the predicate acts charged against the defendant personally, but to "any act, whether or not charged against defendant personally, that qualifies as a RICO predicate act under [the RICO statute]." *Id.* at A28-A29. The court then concluded that "the acts of relevant conduct proffered by the government, all of which are racketeering acts that could have been charged as predicate offenses, come under the heading of 'relevant conduct' for sentencing [petitioner] on the RICO counts * * *, provided they otherwise meet the * * * standards of [Section] 1B1.3(a)(1)(B)." Pet. App. A29, A30.

Accordingly, the court vacated petitioner's sentence and remanded the case to the district court for a determination "(1) [of] the scope of the joint criminal activity explicitly or implicitly agreed to by [petitioner] jointly with others; (2) whether the criminal acts proffered as relevant conduct were in furtherance of this jointly undertaken criminal activity; and (3) whether the proffered acts were reasonably foreseeable in connection with that criminal activity." Pet. App. A25.

ARGUMENT

Petitioner contends that the seven acts proffered by the government do not qualify as "relevant conduct" under the Guidelines, because relevant conduct is limited to racketeering acts specifically charged against the defendant in the RICO counts. As an initial matter, petitioner's claim is not ripe for review by this Court. Petitioner's claim goes solely to his

sentence. There is no sentence to review, however, because the court of appeals remanded the case to the district court for resentencing. The district court may make factual determinations favorable to petitioner on remand, and it therefore may decline to enhance his sentence based on the seven acts proffered by the government. And even if the government prevails on all factual issues on remand, the sentence imposed will be subject to appropriate review by the court of appeals. In any event, the decision of the court of appeals is correct and, as petitioner concedes (Pet. 23-24), does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is unwarranted.

1. The "relevant conduct" provision, Guidelines § 1B1.3(a), states, in pertinent part, that, unless otherwise specified, its provisions shall apply in determining (1) "the base offense level where the guideline [for the offense conduct] specifies more than one base offense level," and (2) "cross references in Chapter Two." The provision governing RICO offenses, Guidelines § 2E1.1, specifies more than one base offense level and it includes a cross-reference to "the offense level applicable to the underlying racketeering activity." See *United States* v. *Masters*, 978 F.2d 281, 284 (7th Cir. 1992) (reference to "underlying racketeering activity" is a cross-reference), cert. denied, 113 S. Ct. 2333 (1993). Accordingly, Section 1B1.3(a) requires the base offense level for a RICO offense to be determined on the basis of "relevant conduct" as defined in that Section.

Section 1B1.3(a)(1)(B) states that "in the case of a jointly undertaken criminal activity," relevant conduct includes "all reasonably foreseeable acts and

omissions of others in furtherance of the jointly undertaken criminal activity." See also Guidelines § 1B1.3 Commentary (Application Note 2). "[J]ointly undertaken criminal activity" is defined as "a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy." *Ibid.* As the court of appeals correctly held, "[h]ere, the RICO enterprise—the Patriarca Family—was a 'jointly undertaken criminal activity.' " Pet. App. A20. Thus, under the relevant conduct Guideline, petitioner may be held accountable for the foreseeable racketeering activity of his cohorts in furtherance of the RICO enterprise.

In addition, the conduct for which petitioner may be held accountable in sentencing, whether committed by a cohort or by petitioner personally, need not have been charged in the indictment. The background commentary to Section 1B1.3 makes clear that "[c]onduct that is not formally charged * * * may enter into the determination of the applicable guideline sentencing range." See also, *e.g.*, *United States* v. *Galloway*, 976 F.2d 414, 424 n.6 (8th Cir. 1992), cert. denied, 113 S. Ct. 1420 (1993); *United States* v. *Miller*, 910 F.2d 1321, 1327 (6th Cir. 1990); *United States* v. *Frederick*, 897 F.2d 490 (10th Cir. 1990).[1]

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[1] In some circuits, an indictment charging a RICO conspiracy need not allege specific predicate acts. See *United States* v. *Glecier*, 923 F.2d 496, 501 (7th Cir.), cert. denied, 112 S. Ct. 54 (1991); *United States* v. *Phillips*, 874 F.2d 123, 127-128 (3d Cir. 1989). If in sentencing a defendant for RICO conspiracy such courts were not permitted to consider uncharged predicate acts, they would be limited to the base offense level of 19, as specified in Section 2E1.1(a)(1), even where the conduct

To be sure, the relevant conduct Guideline would not apply to RICO sentences if the RICO Guideline so specified. See Guidelines § 1B1.3(a) (relevant conduct Guideline applies unless "otherwise specified"). But nothing in the RICO Guideline suggests that relevant conduct should be limited to predicate acts charged against the defendant in the indictment. Contrary to petitioner's submission (Pet. 40), the term "underlying racketeering activity" in Guidelines § 2E1.1(a)(2) contains no such limitation; the term is broad enough to cover both charged and uncharged racketeering acts, and racketeering acts committed either by the defendant himself or his cohorts. As the court of appeals correctly concluded, the term "underlying racketeering activity," when read in conjunction with the relevant conduct Guideline, "means simply any act, whether or not charged against [the] defendant personally, that qualifies as a RICO predicate act under 18 U.S.C. §1961(1) and is otherwise relevant conduct under §1B1.3." Pet. App. A28-A29 (footnote omitted).

In short, the court of appeals was correct in holding that, in determining a defendant's base offense level for a RICO violation, the district court may hold him accountable not only for the predicate acts alleged against him in the indictment, but also for (1) any uncharged predicate acts he committed in furtherance of the RICO enterprise and (2) any foreseeable predicate acts, whether charged or uncharged, committed in furtherance of the enterprise by its other members.

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underlying the conspiracy was much more serious than other level 19 offenses. See Pet. App. A28.

2. In support of his position, petitioner argues (Pet. 36-44) that RICO is a multiple-object offense subject to Guidelines § 1B1.2(d), which provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." Petitioner then invokes Application Notes 1 and 5 of Section 1B1.2 for the proposition that the term "underlying racketeering activity" in the RICO Guideline refers to predicate acts specifically alleged against the defendant in the indictment.

Section 1B1.2(d) is not applicable here. By its terms, that Section is limited to "count[s] charging a conspiracy." It therefore does not apply to the substantive RICO count, because a substantive RICO count does not charge a conspiracy. Although the RICO conspiracy count does obviously charge a conspiracy, the charged conspiracy had only a single object—the commission of a pattern of racketeering activity in furtherance of the enterprise. See *United States* v. *Neapolitan*, 791 F.2d 489, 496 (7th Cir.) ("The goal of a RICO conspiracy * * * is a violation of RICO."), cert. denied, 479 U.S. 940 (1986). Section 1B1.2(d), by contrast, is addressed to the problem of sentencing for multiple-object conspiracies.

Nor is petitioner helped by Application Notes 1 and 5 of Section 1B1.2. Note 1 provides in pertinent part that when a particular statute proscribes a variety of conduct covered by different Guidelines, the court should determine the applicable Guideline based on the nature of the offense conduct "charged in the count of which the defendant was convicted." As the court of appeals explained, "[i]t is clear * * * that the

note is meant to guide courts in the initial selection of the applicable guideline in Chapter Two * * *. There is no question here that the applicable guideline for RICO convictions is §2E1.1." Pet. App. A31. Nothing in the note limits relevant conduct in a RICO case to charged predicate acts.

Note 5 of Section 1B1.2 provides that in cases in which the verdict does not establish which offense was the object of a charged multiple-object conspiracy, the court should apply subsection (d) of that Section with respect to an object offense "alleged in the conspiracy count" only if the court would convict the defendant of conspiring to commit that offense were it sitting as the trier of fact. Like Section 1B1.2(d) itself, however, Note 5 applies only to sentencing for multiple-object conspiracies. It therefore has no application to petitioner's case.

3. Petitioner also argues (Pet. 44-47) that the Guidelines are closer to a "charge offense" system than a "real offense" system—*i.e.*, courts are generally to look to the count of conviction in determining the applicable Guideline rather than to the specific circumstances of the offense—and that increasing a defendant's sentence for a RICO violation on the basis of uncharged predicate acts ignores that distinction. Although it is true for the most part that courts must sentence by looking initially to the charge of which the defendant was convicted, "real offense principles enter into the punishment prescribed in the guidelines through [among other provisions] the relevant conduct guideline." Pet. App. A44. As in other types of cases, the government's omission in a RICO case to "charge[] and prove[] beyond a reasonable doubt the conduct * * * asserted as relevant conduct does not

prevent the increase in [the] sentence resulting from the relevant conduct guideline." *Id.* at A46.[2]

Contrary to petitioner's contention (Pet. 52-53), the fact that application of real offense principles may impose an additional fact-finding burden on sentencing courts is no reason to ignore the Commission's intention that such principles apply in determining relevant conduct. As the court of appeals observed, "the wide range of crimes covered by RICO may inject new complexities [in determining relevant conduct], but, if so, the remedy lies with the Sentencing Commission." Pet. App. A51. Even if petitioner is correct in claiming that the court of appeals' construction of the Guidelines is inconsistent with the Commission's intent, the Commission is in the best position to make that clear. See *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991).

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[2] Petitioner complains (Pet. 47-50) that, as a matter of due process, he should, prior to his guilty plea, have been afforded notice that the government would seek imposition of an enhanced sentence based on relevant conduct not charged in the indictment. Noting that the district court had not addressed that issue at sentencing, the court of appeals declined to decide it in the first instance. Pet. App. A53-A55. Instead, the court of appeals directed the district court to consider the issue on remand if it otherwise determined to increase petitioner's RICO sentence based on the proffered relevant conduct. *Id.* at A55. In those circumstances, the issue of notice is not ripe for review by this Court. We note, however, that prior to petitioner's guilty plea, the government explicitly informed him that it would ask the court to include specific acts of relevant conduct in determining his sentence. See *id.* at A8. The relevant conduct Guideline itself afforded petitioner notice that the relevant conduct the government would proffer could consist of offenses that were not charged in the indictment. See Guidelines § 1B1.3 Commentary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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